FOR ARGUMENT

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1105

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ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

*Defendants,*

BARRY LANDO, MIKE WALLACE and CBS INC.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Petitioner ("plaintiff") submits this reply brief to respond to certain arguments contained in the Brief of Respondents ("defendants") ("Def. Br."), the amici curiae briefs of the New York Times, *et al.* ("amici Br.") and the American Newspaper Publishers Association ("ANPA Br.").

## Summary of Argument

Defendants and amici have erroneously portrayed the District Court opinion as failing to consider the factual context of the disputed questions and the First Amendment concerns involved. Judge Haight grounded his decision on the principles of *Sullivan,* examined the centrality of defendants' subjective state of mind to the issues in the case, required that the discovery sought be relevant to that critical issue and found that the disputed inquiries were designed to obtain the most direct proof of that issue.

Defendants and amici attempt to create an issue of discovery abuse which is not justified by the history of this case or the nature of the disputed discovery. The conflict between the parties has not involved an issue of unrestrained or overbroad discovery. The questions relate to specific matters relevant to the central issue of defendants' state of mind regarding the truth or falsity of the published matters. The extent of discovery conducted by plaintiff has been no greater than required in light of the activities of defendants in preparing the Program. Defendants cannot show that the judiciary will be unwilling or unable to regulate the proper bounds of discovery or that there is any rational basis for believing that such discovery of relevant facts from the press has or will deter it from its constitutional functions.

Defendants and amici attempt to support the Court of Appeals decision by removing this case from the framework of *Sullivan* principles and placing it within a structure consisting of cases involving governmental restraint or compulsion of publication and cases involving the privilege of confidentiality for governmental decision-making. Reliance upon these cases, together with allusions to dangers signified by interrogations conducted in other so-



cieties or before Congressional committees during periods of our own history, while ignoring analogous cases wherein this Court declined to hold that the First Amendment required concealment by some of evidence required of all others, fails to support the creation of a new and absolute privilege.

The editorial process privilege created by the Court of Appeals deprives *Sullivan* plaintiffs of the opportunity to obtain direct evidence of actual malice and precludes proof of a substantial portion of what might possibly constitute circumstantial evidence. The substantial deprivation of the ability of a plaintiff to prove his case cannot be minimized by references to criminal cases where defendants do not testify because of the Fifth Amendment Privilege or to cases where the required state of mind is defined by an objective standard. In contrast, the alleged chilling effect on the press by the disclosure here sought is purely speculative. The factors found in *Zurcher* v. *The Stanford Daily,* —— U.S. ——, 56 L.Ed.2d 525 (1978) as a sufficient safeguard against any incremental chilling effect are even more substantial in the present case.

## ARGUMENT

### POINT I

**Defendants Fundamentally Misdescribe the District Court's Consideration of the Factual Context of the Disputed Questions and Recognition of First Amendment Concerns.**

Defendants would have this Court believe that the disputed questions were never considered by the District Court specifically or within their factual context and that, therefore, the District Court could not and did not reach any factual conclusions as to those questions (*see, e.g.*, Def. Br. pp. 5n, 14n, 61). The history of this litigation disproves defendants' contention.*

After considering the factual context of the questions and their relationship to the issues that must be proven, Judge Haight rejected defendants' objections:

> The first five areas of dispute . . . relate to Lando's conclusions, opinions, and intentions, formulated during the period of time that he was researching and preparing the television program and the Atlantic article, with particular reference to people or leads to be pursued or not to be pursued, the veracity of per-

* A list of the specific questions in dispute and the deposition transcripts were before the District Court. Defendants separated the disputed questions into defined areas of inquiry. These categories were adopted by the District Court in determining the relevancy of the questions. (P 57a) Plaintiff presented a detailed factual statement to "provide a context for ascertaining the relevancy of the questions which the witnesses have refused to answer" (Rec. Doc. 55—Pl. Memo. of Law to Dist. Ct. p. 6; *see* pp. 6-20). Defendants broadly objected to the questions (Rec. Doc. 54—Def. Memo. of Law to Dist. Ct. pp. 17-21, 23-24, 25-30).



> sons interviewed, and the reasons why certain material was included or excluded.
>
> * * *
>
> . . . Where, as here, the defendant's state of mind is of central importance to a proper resolution of the merits, it is obvious that these lines of inquiry may lead, directly or indirectly, to admissible evidence. As in all cases, civil or criminal, turning upon the state of an individual's mind, direct evidence may be rare; usually the trier of the facts is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writings, or other indicia. . . .
>
> * * *
>
> The publisher's opinions and conclusions with respect to veracity, reliability, and the preference of one source of information over another are clearly relevant. . . .
>
> * * *
>
> The lines of inquiry under discussion are entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source over another. It is quite apparent that Col. Herbert, at the times in question, was a controversial figure, highly regarded in certain quarters, but viewed with considerably less favor in others. Herbert is entitled to full discovery on these lines of inquiry. . . .
>
> (P 64a-66a)*

* Before the Court of Appeals, defendants continued to press for a broad ruling that matters involving the editorial process be shielded from inquiry rather than consideration of each disputed question (Def. Br. to Court of Appeals, pp. 7-8; *also see* J. Oakes, concurrence P 25a). Plaintiff, on the other hand, specifically discussed the factual context of the disputed questions and their particular relevancy to the issue of actual malice (Pl. Br. to Ct. of Appeals, pp. 9-16, 45-49).

Defendants and amici further miscast Judge Haight's decision as ignoring all First Amendment concerns while declaring that *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), had nothing to do with this case. (Def. Br. p. 13; amici Br. pp. 7-8) In fact, the District Court decision is grounded upon a full recognition of First Amendment concerns. Judge Haight described the kinds of statements that are not entitled to constitutional protection and noted that unprotected false statements made in reckless disregard of the truth require proof that the publisher in fact entertained serious doubts as to the truth of the publication ( P 59a-61a). The Court thus faithfully followed the principles of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), as to the limited group of statements not entitled to First Amendment protection and the nature of reckless falsehood within that group. The Court proceeded to analyze the significance of the disputed questions to proving the subjective state of mind requisite to establishing reckless disregard. Judge Haight found that "nothing in the First Amendment requires" denying discovery on the crucial issue (P 63a). The Court then determined whether the particular areas of inquiry might lead, directly or indirectly, to admissible evidence as to defendant's state of mind—an issue "of central importance to a proper resolution of the merits." (P 64a)*

* In his subsequent decision certifying an interlocutory appeal, Judge Haight described his earlier decision directing defendants to answer the disputed questions:

> As this Court observed in its original opinion, the proper breadth and scope of such a plaintiff's pre-trial discovery * * * must be determined within the context of considerations that arise out of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny. Those considerations include: the scope of protection given by the First Amendment to publishers or other media who direct their attentions to "public figures"; the bases upon which such figures may hold publishers and media liable for defamation, notwithstanding that First Amendment protection; and the proper function of pre-trial discovery procedures, having in mind the plaintiff's bases of liability, the burden of proof he bears, and the defendant's First Amendment rights. (P 91a-92a)



Judge Haight's analysis of *Tornillo* was obviously not made in a vacuum. It began with the statement that *Tornillo* and *Columbia Broadcasting System, Inc.*, v. *Democratic National Committee*, 412 U.S. 94 (1973) "deal with statutes or regulations purporting to specify what newspapers or broadcasting stations must print or say", concluding with a sentence which reads in full "These cases have nothing to do with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious publication." (P 67a) Judge Haight's view of *Tornillo* was entirely consistent with the decisions of this Court which have repeatedly found that the appropriate measure of First Amendment protection is determined by the nature of the particular governmental or state action involved, rather than the particular media function (*see* Pl. Br. pp. 36-41).

## POINT II

### Defendants Erroneously Characterize This Case as One of Discovery Abuse.

Both defendants and amici would have this Court believe that the issues presented here for review arise in and turn upon the context of discovery abuse.* Although there is no dispute over the fact that Lando's deposition transcript

* The brief of amici contains serious inaccuracies and misperceptions. There is no evidence whatever, for example, to support the remarkable assertion (amici Br., pp. 7, 22) that plaintiff's discovery "served to immobilize one of CBS' leading investigative news teams for more than a year"; defendants did *not* "provide [ ] all requested material" (amici Br., p. 6): the agreement of counsel concerning the sequence of discovery (amici Br., p. 6) covered only the subject of depositions, and Herbert provided thousands of pages of documents to defendants in response to demands pursuant to F.R.C.P. Rule 34.

numbers 2903 pages and that 240 exhibits were marked for identification, assertions that plaintiff has misused and abused the discovery rules or that the District Court's order "perverts" those rules (Def. Br., p. 25) are simply incorrect.

The Lando deposition followed the production by defendants of most of Lando's notes and memoranda pertaining to interviews conducted by him in the course of his work on the Program and the Article. The bulk of these notes was in Lando's handwriting; of necessity, some portion of the deposition was concerned with the mere deciphering of this handwriting so that it could be understood. Still more deposition time involved seeking clarification of abbreviations, initials, disjointed words in lieu of full sentences, and times, places and persons involved or referred to in these notes. The time and expense involved in this necessary pursuit fell as heavily upon plaintiff as upon defendants. When this portion of the Lando deposition is eliminated, the total length of the transcript pertaining to actual questions and answers is substantially reduced. (*Cf.* P 19a, n. 18.)

Plaintiff, of course, supports efforts to analyze the causes and supply the answers to problems of abuse of the liberal discovery provisions of the Federal Rules. The cases, addresses and other thoughtful materials cited by defendants and amici directed to this problem do not, however, go to the issues raised on this appeal in the unique factual setting of this defamation action.*

Carefully built into the Federal Rules are specific provisions designed to protect a party from harassing, burden-

* While defendants liberally cite authorities expressing concern over discovery excesses and their concomitant effect upon the burdens imposed upon the federal judiciary, they omit reference to the fact that their document demands of Herbert required his production of *more than 11,000 pages* of materials with the expectation of more demands to come.



some or unfounded discovery. Rule 26(c) specifically provides for issuance of protective orders to protect any moving party from "annoyance, embarrassment, oppression, or undue burden or expense." Defendants did not raise below any claim that plaintiff's discovery efforts had been harassing or abusive in any manner.* The discovery disputes here arise pursuant to plaintiff's motion to compel answers, not defendants' request for protective relief.

Much of the argument now presented by defendants and amici addressed to the "potential" for abuse of discovery processes (*See, e.g.*, Def. Br. pp. 19-20, 24-26; amici Br. 21-26), apparently assumes that trial judges will be unable or unwilling to fairly evaluate claims that discovery processes are being abused and call an appropriate halt when processes (*See, e.g.*, Def. Br. pp. 19-20, 24-26; amici Br. pp. such abuse is found. As this Court most recently noted in *Zurcher* v. *The Stanford Daily, supra,* 56 L.Ed.2d at 542, predicted or potential abuses of traditional court processes do not justify special rules for the press where sufficient controls exist to prevent abuse. Mr. Justice Powell, concurring in *Zurcher, supra,* pointed to precisely such available protections when he noted that due regard for First Amendment concerns and for normal guideposts of reasonableness and particularity would minimize perceived dangers of unrestrained or limitless inquiry:

> . . . [T]he magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises,

* The suggestion that the course of discovery here reflects "retaliatory" objectives by Herbert (amici Br., pp. 12, 26-28) completely disregards the substantial societal interests served by providing legal redress for damage to reputation. In the factual setting of this action, such an unfounded accusation is nothing short of remarkable. *Cf.* P 19a and n. 19.

and the position and interests of the owner or occupant.

(56 L.Ed.2d at 544)

While discovery here may have been extensive, there is no basis for finding that plaintiff had stepped beyond the permissible bounds of the Federal Rules in utilizing appropriate discovery techniques.* There is also no basis for the more generalized claim that application of the discovery rules to this specific legal and factual setting would chill First Amendments rights.**

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* Commentators on potential discovery abuse and the need to seek additional guidance in curbing such potential have been careful to note that remedies must be fashioned "which will neither impose undue burdens on the courts nor prove unfair to litigants with genuine need for extensive discovery." *The Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 192 (1976).

** *Zurcher* rejected the claim that such a chill would occur if search warrants could issue against newspapers. "The fact is that respondents and amici have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse, and if abuse occurs, there will be time enough to deal with it. . . ." 56 L.Ed. 2d at 542. *Cf. Gravel* v. *United States*, 408 U.S. 606, 629, n.18 (1972). That abuse of discovery exists in some cases, has never been treated as a basis for denying extensive discovery in other cases. The press has not been chilled to date by the knowledge that such discovery might occur.



## POINT III

**Defendants Erroneously Attempt to Support the Court of Appeals Decision by First Amendment and Privilege Cases Not Applicable to *Sullivan* Libel Actions or the Disclosure Issues Involved herein.**

***Restraint and Control of the Press Cases***

As noted in plaintiff's principal brief (pp. 36-41), the District Court order here involved neither prior restraint nor subsequent compulsion to publish anything. The day-to-day exercise of "editorial control and judgment" by the media referred to in *Tornillo*, 418 U.S. at 258, as beyond legislative determination and direction is not thereby placed beyond the reach of compulsory judicial process in a defamation action seeking redress for the publication of malicious falsehoods. Defendants cite the opinion of the Chief Justice in *Houchins* v. *KQED, Inc.*, 46 U.S.L.W. 4830, 4832 (U.S. June 26, 1978) (Def. Br. p. 29), which notes that "the government cannot restrain communication of whatever information the media acquires—and which they elect to reveal" as supportive authority for the *per se* rule enunciated by the Court of Appeals, which is grounded upon equating prior restraint with subsequent accountability. The media's right to gather and receive information and to decide which information collected will be imparted to the public and in what form is not at issue here. What is at issue is whether a Court may conclude in a libel action that relevant evidence in the media's sole possession may properly be disclosed to shed light on the central issue of whether the decision to impart information was made in knowing or reckless disregard of its falsity.*

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* Similarly not at issue here are the practices of societies which do not follow our First Amendment in concept or structure (Def.

The "*sine qua non* of responsible journalism" (P 13a) may indeed involve the weighing and testing of hypotheses before the election is made to release information to the public. But it is *not* "responsible" journalism which is at issue in a libel case; and it is not some distant judge idly toying with daily newsroom decisions whose aid is sought in libel discovery matters. It is a victim of the breakdown of responsibility—a member of the public on whose behalf the press functions and for whom First Amendment protections are intended—who seeks the Court's assistance in redressing the damage caused. If the evidence in a libel action discloses the actual malice *Sullivan* demands, "responsible" journalism suffers no injury but is enhanced and assured.

***Confidentiality of Governmental Deliberations***

Defendants seek to support the conclusion that the editorial process is immune to relevant inquiry with the claim that historic, constitutionally-based protections accorded the executive, legislative and judiciary apply with equal force to the media as a fourth branch of government. In *United States* v. *Nixon*, 418 U.S. 683 (1974) this Court considered a Presidential claim of privilege based upon "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *Id.* at 705. The Court held that the claimed executive privilege, although "derive[d] from the supremacy of each branch within its own assigned area of constitutional duties," *id.*, was *not* absolute and unqualified, *id.* at 706:

Br. pp. 30-32 and n.*) or the tragic departure in our own history from these dictates (*e.g.*, pp. 32-34 n. **). To suggest, for example, that District Judge Haight's order is comparable to Senator McCarthy's abuse of legislative powers is surely to discredit the ability of any and all federal judges to properly carry out their role consistent with the Constitution's demands.



> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.
>
> *Id.* at 709.

Defendants urge that the "presumptive," but nonetheless qualified, constitutional privilege which this Court held attaches to Presidential communications in its *Nixon* decision supports a greater protection to the press—an absolute privilege—to resist compulsory process seeking full disclosure of all the facts relevant to the issues before the Court. Yet an absolute "editorial process" privilege would preclude precisely this proof without even particularizing any concrete injury which would flow from disclosure of this relevant evidence in a particular libel case.* As the *Nixon* opinion further clarifies, neither creation of new privileges nor expansion of existing ones are lightly viewed by the courts:

> Because of the key role of the testimony of witnesses in the judicial process, courts have historically

* Defendants quote Chief Justice Burger's statement concerning the teaching of "human experience," *id.* at 705, where there is an expectation that remarks may be publicly disseminated and assert that that statement answers Judge Meskill's requirement that claims of chilling effect depend on proof supplied by the parties (P 52a) (Def.'s Br. p. 36 and n). Yet this Court specifically concluded in *Nixon* that advisors would not be moved "to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution" 418 U.S. at 712. It is pure conjecture to suggest that the press nevertheless would temper its candor because disclosure might be called for in a *Sullivan* action of areas concretely shown to be relevant to an issue in the case.

been cautious about privileges. Mr. Justice Frankfurter, dissenting in Elkins v. United States [364 US 206 (1960)], said of this: Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending, the normally predominant principle of utilizing all rational means for ascertaining truth.

(418 U.S. at 710, n.18)

The "singularly unique role under Article II* of a President's communications and activities, related to the performance of duties under that Article," *id.* at 715, which warranted the "presumptive" constitutionally based executive privilege, is certainly not grounds for the contention that the "editorial process" is presumptively privileged against disclosure because the First Amendment guarantees "freedom of the press." **

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* "[A] President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual,'" necessitating, "in the public interest," the "greatest protection [to Presidential confidentiality] consistent with the fair administration of justice." *Id.*

** Defendants also seek to distinguish the *Nixon* result because there the need for full disclosure arose from a constitutional guarantee while here it arises from a historical common-law right. Their citation of *Paul* v. *Davis*, 424 U.S. 693 (1976) (Def. Br. p. 37 n*) following the comment that "here a First Amendment right is pitted against a common-law cause of action not directly rooted in the Constitution" is difficult to explain in light of the fact that it was the *Sullivan* decision that struck the balance between First Amendment rights and the common-law action while *Paul* v. *Davis* merely considered the status of a defamation action for purposes of invoking the Due Process Clause. Obviously, this Court in *Sullivan* was well aware of the common-law roots of defamation actions in preserving that action against the press where a showing of actual malice is made.



The cases cited by defendants (Def. Br. pp. 37-39) are inapposite to the situation posed here. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom. V.E.B. Carl Zeiss, Jena* v. *Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967), for example, held that "documents integral to an *appropriate* exercise of the executive's decisional and policy-making functions," 40 F.R.D. at 324, were immune from production by the Government in a litigation to which it was not a party (emphasis added). The Court observed that even generally meritorious claims of executive privilege were not without exception:

> To restate the Government's claim and its justifications is not to say that non-disclosure is to follow in all instances where the conditions prerequisite to invoking the privilege are found to exist. *Nor is it to suggest that the interests it protects cannot be outweighed in particular situations by a sufficiently strong showing of necessity for examination.* . . .
>
> (*id.* at 327; emphasis added)

Executive privilege has not been held to immunize the government from discovery where questions of bad faith are involved or where there has been a *prima facie* showing of impropriety. Thus, in *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court held that the mental process of governmental decision-makers could be the subject of judicial scrutiny where such inquiry might be essential to effective review of a claim that the Secretary of Transportation had exceeded the scope of his authority under the Federal-Aid Highway Act in approving highway construction through a public park. In remanding the case to the District Court for review of the Secretary's decision, Mr. Justice Marshall explained that

review was to be directed beyond "the full administrative record that was before [him] at the time he made his decision", because "the bare record may not disclose the factors that were considered or the Secretary's contruction of the evidence". Thus, the District Court was held entitled to require "some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." *Id.* at 420. The proper basis for distinguishing the "general bar against probing 'mental processes' of administrative decision-makers" (*cf.* Def. Br., p. 37n***) from a judicial proceeding where state of mind is a crucial inquiry was explained as follows:

> The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision-makers is usually to be avoided. [Citing *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).] And where there are administrative findings that were made at the same time as the decision, as was the case in Morgan, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and *it may be that the only way there can be effective judicial review is by examining the decision-makers themselves.* See *Shaughnessy* v. *Accardi* [349 U.S. 280 (1955)].
>
> *Id.* (emphasis added)

*See also: KFC National Management Corp.* v. *N.L.R.B.*, 497 F.2d 298, 305 (2d Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976); *Smith* v. *Schlesinger*, 513 F.2d 462 (D.C. Cir. 1975).*

* Cases cited in the ANPA brief (pp. 7-10) wherein "opinion" discovery was denied are, of course, not dispositive of any discovery claim where a party's state of mind is a central fact to be proven or disproven in the case. The Court in *Frankenhauser* v. *Rizzo*, 59 F.R.D. 339 (E.D.Pa. 1973), for example, ordered disclosure, over a claim of governmental privilege, of substantial portions of witness statements and police reports. Its direction that evaluative, opinion data be excised was founded upon the premise that such material was not central to the issues in the case.



The qualified common-law executive privilege concerning matters of an advisory or evaluative nature is designed to permit unfettered policy-making by government officials.* Numerous decisions have recognized that this qualified claim must be determined on a case-by-case basis. *See, e.g., Wood* v. *Breier*, 54 F.R.D. 7, 12-13 (E.D.Wisc. 1972).** *See also: Jabara* v. *Kelly*, 62 F.R.D. 424, 425-431

* General policy decisions by CBS or any other media institution or member are, of course, not involved in this case. Neither plaintiff nor the District Court sought compelled disclosure of random, ongoing editorial positions or actions. Defendants, however, appear to view this disclosure differently when they describe the questions asked by Senator Joseph McCarthy to James Wechsler at a Congressional Hearing as "precisely the questions put to Mr. Lando." (Defs. Br. p. 32 and footnote **) Lando was asked questions concerning his specific conclusions, bases and intentions in reference to particular materials investigated or presented on the Program where contradictions or other aspects of those discovered materials bore on the issue of whether defendants entertained serious doubts as to matters aired. The questions put to Mr. Wechsler were broad inquiries concerning the general editorial policy of the publisher to praise or criticize J. Edgar Hoover, the F.B.I. and the Chairman of the House Un-American Activities Committee and the publisher's opinion of the heads of that Committee and of whether Senator Jenner was doing a good job. To be concerned about the inquiries undertaken by Senator McCarthy of the press (and of members of the general public as well) does not, we submit, require, or even suggest, that one must oppose the efforts of a plaintiff in a *Sullivan* libel action to obtain direct proof of the critical issue of the reporter's subjective state of mind by asking specific questions on particular materials discovered which bear on the issue of whether the reporter knew that the published material was false or entertained serious doubts as to the truth of that material.

** In *Wood* the executive privilege claim included the argument that production would have a chilling effect upon the department's ability to obtain full and candid police reports. The Court rejected

(E.D.Mich. 1974), and cases cited therein; *Community Savings & Loan Ass'n.* v. *Federal Home Loan Bank Bd.*, 68 F.R.D. 378, 381-382 (E.D.Wisc. 1975) and cases cited therein (ordering disclosure of opinions, evaluations and recommendations by federal agency).*

***Speech and Debate Clause***

Defendants urge that the absolute editorial process privilege finds justification in the protections afforded under the Speech and Debate Clause to members of Congress and their aides, citing *Gravel* v. *United States*, 408 U.S. 606 (1972). There the Court defined the purpose of the Speech and Debate Clause as

> designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that *directly* impinge upon or threaten the legislative process.
>
> (408 U.S. at 616, emphasis added)

However, this Congressional privilege does not absolve legislators or aides from responsibility for criminal conduct, *id.* at 615, 626, nor from ever being accountable for infringing the rights of others. *Id.* at 618-621. The Court specifically refused to find that the Senator's alleged arrangement with the publishing company was conduct pro-

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the claim, noting that such contentions "viewed through legal eyes" were "at best of remote impact." 54 F.R.D. at 13.

* The Freedom of Information Act exemption for intra-agency and inter-agency memoranda, 5 U.S.C. §552(b)(5), merely sets limits upon the ability of a member of the public to obtain particular documents from government files. It does not prevent a private litigant who can "override a privilege claim set up by the Government" depending "on the extent of the litigant's need in the context of the facts of his particular case, or on the nature of the case," *N.L.R.B.* v. *Sears Roebuck & Co.*, 421 U.S. 132, 148 n. 16 (1975), from obtaining such documents.



tected by the Speech and Debate Clause, warranting disclosure immunity for either the Senator or the publisher. *Id.* at 625-626.

The First Amendment immunity claims raised by Beacon Press and various scholars were rejected by the lower courts. *See: United States* v. *Doe (In re Falk)*, 332 F. Supp. 938, 941-942 (D.Mass. 1971):

> . . . Here . . . the government has indicated the specific statutory offenses which it is investigating, . . . and the reasonableness of such investigation is supported by the fact that at least some of the Pentagon Papers, or copies thereof, were possessed by persons in Massachusetts, since portions were published by a Boston newspaper. *Where the investigation is thus focused, the Court will not presume that men of substantial intelligence and good intent will be inhibited from pursuing otherwise lawful activity;* it is more rational, and more likely that such persons will presume that the grand jury process will not be misused against them.*

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* In a footnote, the Court presaged the very point urged by Judge Meskill below in dissent that judicial review is "supposed to" have a chilling effect upon "the publication of lies" (P 46a): "The issue of the legality of Professor Falk's information and sources is not before the court and for purposes of this decision the information is presumed both lawful and of public value. *Obviously, sources of illegally revealed information may and must be 'inhibited' by investigation and prosecution.*" 332 F.Supp. at 941, n.2 (emphasis added). *See also: Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Mahen* v. *Hughes Tool Co.*, 569 F.2d 459, 479-480 (9th Cir. 1977); *cf. F.C.C.* v. *Pacific Foundation*, —— U.S. ——, 56 L.Ed.2d 697 (1977).

***The Framers Accommodation of Defamation Actions and a Free Press***

Defendants have concluded that the Framers of the Constitution intended to accord to liberty of the press a special significance and a critical position in the hierarchy of freedoms. (Def. Br. p. 51) This conclusion, however, offers all the more reason to sustain plaintiff's position. In their analysis of First Amendment history defendants ignore the fact that the strongest advocates of freedom of the press in eighteenth century America, upon whom they rely for their conclusion, viewed a private right of action by public officials in state courts for reparations for injury to reputation as perfectly compatible with the highest degree of protection for the press from governmental restraint.

James Madison in his *Report of the Virginia Resolutions of 1798*, cited by defendants (Def. Br. p. 53), points out that the policy of the Constitution is one of

> . . . binding the hand of the federal government from touching the channel which alone can give efficacy to its responsibility to its constituents; *and of leaving those who administer it, to a remedy for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties.*
>
> *The Virginia Report of 1799-1800*, reprinted in part in L. Levy, *Freedom of the Press From Zenger to Jefferson* (1966), pp. 197, 220. (Emphasis added)*

* Similarly, the Republican writer of the *Minority Report on Repeal of the Sedition Act* was careful to note that the rights of public officers to restitution for injury from defamation were preserved by private libel actions in the state courts. (*Minority Report on Repeal of the Sedition Act*, February 25, 1799, Annals of Congress, 5th Congress, 3d Sess. pp. 2987-2990, 3003-3014, reprinted in part in L. Levy *supra*, pp. 171, 186.)



While repudiating the concept of seditious libel, the libertarians of the eighteenth century assured the American people of the continuing efficacy of private libel actions to preserve the social and political values of individual reputation and a responsible press. For them the First Amendment freedoms were not threatened by the preservation of those values.*

***Governmental Action and the Press Function***

Defendants conclude Point I of their brief, with the assertion that what is "at stake in this appeal" is the rule "that the government may not use a peculiarly *govern-*

* George Hay's *Essay on Liberty of the Press* expressed the libertarian thesis:

> The absolute freedom then, or what is the same thing, the freedom, belonging to man before any social compact, is the power uncontrouled by law, of doing what he pleases, *provided he does no injury to any other individual.* If this definition be applied to the press, as surely it ought to be, the press, if I may personify it, may do whatever it pleases to do, uncontrouled by any law, *taking care however to do no injury to any individual.* This injury can only be by slander or defamation and reparation should be made for it in a state of nature as well as in society. "Hortensius" (George Hay) *An Essay on the Liberty of the Press* (Richmond, Va., 1803), pp. 21-30 (reprint of original, Philadelphia, 1799), reprinted in part in L. Levy, *supra*, pp. 186, 189.

Tunis Wortman, known as the political theorist of the libertarian thesis (L. Levy, *supra*, p. 229), as well saw the need to maintain a balance between the interest of the individual public officer in protecting his good name from the abuses of a sometimes irresponsible press and the freedom of the press:

> It is far from being maintained that Slander should be suffered to exist with impunity. On the contrary, it is admitted that rational and judicious measures should be taken to deprive it of its sting. But it is contended, that private prosecutions at the suit of the injured party, are sufficient to answer every beneficial purpose, and will entirely supercede the necessity of criminal coercion. . . . Tunis Wortman, *A Treatise Concerning Political Enquiry, and the Liberty of the Press* (New York: George Foremen, 1800) reprinted in part in L. Levy, *supra*, pp. 230, 280.

*mental* function . . . the unlimited discovery probe . . . to invade the editorial functions of the press." (Def. Br. p. 57) This formulation reflects the problem with much of defendants' analysis. It is not the government seeking to utilize discovery, but a private citizen; it is not unlimited discovery which is sought, but the answers to questions directly involving a concededly critical issue in the case; it is not an invasion of the editorial functions of the press which is involved, but rather an attempt to ascertain post-publication whether false statements are actionable under *Sullivan* standards. No issue of restrictions upon the public's access to information is raised by the equal application to members of the media community of judicially-supervised compulsory process applicable to the general public.

As noted in plaintiff's main brief (pp. 37-39), the *Tornillo* decision's concern for protection of editorial judgments arises in a quite different context than the case now before the Court. In the words of Mr. Justice White, the "core question" in *Tornillo* was "[c]ompelling editors or publishers to publish that which 'reason' tells them should not be published," 418 U.S. at 256 (White, J., concurring). Compelled *publication* is not at issue here. Compelled disclosure of pertinent facts by a journalist-party, using the same careful standards of relevancy and need applicable to a non-journalist party, is all that the District Court ordered be done. The claim that the "editorial process" exempts the press from obligations exacted of others must thus be rejected. As Mr. Justice Powell noted in another context:

> "If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief. . . . [T]here is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press as to every other person.
>
> (*Zurcher* v. *The Stanford Daily*, *supra*, 56 L.Ed. 2d at 544 [Powell, J., concurring])



The sensitivity which this Court has displayed toward preventing governmental action from infringing upon First Amendment rights has never extended to creating absolute or even qualified privileges which apply regardless of whether specific injury is shown. Thus *Laird* v. *Tatum*, 408 U.S. 1, 10 (1972) declined to sustain a claim that First Amendment rights were chilled by the "mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." The Court distinguished those cases where governmental action was shown to cause a demonstrable, albeit indirect, impairment of First Amendment rights,* and noted that

> . . . [T]hese decisions have in no way eroded the 'established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action. . . .' Ex parte Levitt, 302 U.S. 633, 634, 82 L Ed 493, 56 S Ct 1 (1937).
>
> (408 U.S. at 13)

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* *See*, 408 U.S. at 11-13; *Compare*, Def.'s Br. pp. 40-45. Refusal to declare governmental action violative of the Constitution in the face of mere speculation about possible future injury is not unique. *See, e.g. Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367, 396 (1969); *F.C.C.* v. *Pacific Foundation, supra.*

That the press serves a critical function in our society, has a "checking value," or that its independence from government intrusion is important to our constitutional system is not in dispute here. But, as with government itself, there are occasions where conduct crosses the line from the lawful to the unlawful. Neither the First Amendment, nor any other provision of the Constitution, demands or implies that unlawful conduct may properly escape punishment because it is engaged in by one from whom better things are demanded and in whom a public trust is placed.

## POINT IV

### Defendants Erroneously Argue That the Absolute Privilege for Editorial Judgment Has Not Altered the Substantive Principles of *Sullivan*.

Defendants reject all arguments concerning the impact of the privilege created by the decision below on the ability of *Sullivan* plaintiffs to prove liability under the principles of that case. (Def. Br. p. 65) However, the reasoning in support of their position is not persuasive. While defendants quote from the opinion of Judge Oakes and a statement by this Court in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) (Def. Br. pp. 62, 64), regarding the possibility of inferring actual malice from circumstantial evidence, they do not address the fact that the editorial judgment privilege does actually prohibit discovery of direct and concrete evidence of a defendant's state of mind. For example, defendants simply ignore the fact that in this very case where direct proof was obtained of the reporter's doubts, awareness, and intentions as to items pertaining to the truth or falsity of subject matters involved in the publication (Pl. Br. pp. 27-28), the new privilege of editorial



judgment would render impossible the securing of such direct evidence.*

In his opinion Judge Oakes had commented that the decision below may deprive plaintiff of the means for "adducing the best proof of malice in the common law sense of ill will toward the plaintiff" (P 41a, n. 31). Defendants conclude that such a result is of no signficance since the actual malice required by *Sullivan* is not common law malice. (Def. Br. p. 64 n. **) The recitation of that quite obvious principle is not, however, responsive to the fact that past decisions have treated common law malice elements as some circumstantial evidence of actual malice (see Pl. Br. p. 28, n. **) and that the creation of an editorial judgment privilege precludes not only direct evidence of a defendant's awareness and doubts as to the truth or falsity of matters published, but also evidence which might constitute some circumstantial proof of defendants' actual malice.

Defendants' attempt to analogize the instant issue to the use of circumstantial evidence in criminal cases (Def. Br. p. 65 n.) is entirely misplaced. In such cases, "where the Fifth Amendment stands as a barrier to direct inquiry" as to defendant's state of mind (*id.*), the defendant does not take the stand at all. In contrast, defendants herein have testified to many matters while seeking to claim a

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* Even the one specific item noted by Judge Oakes—information contained in the F.O.I.A. documents—may be in a precarious position as possibly within the sanctuary of nondisclosure established by the new privilege unless released by the reporter who has the privilege. Notwithstanding the specific reference to this ramification of the privilege in plaintiff's brief (p. 27, n. ** and p. 28, n. *), defendants' brief is strangely silent regarding this issue, while it repeats the statement of Judge Oakes.

privilege of silence as to a critical issue.* There is no doubt that the defendant who has taken the stand in a criminal case would have to answer questions directed at his state of mind—intent, knowledge, motive.** Thus, the testimonial rules governing the operation of the Fifth Amendment Privilege lead to a result directly contrary to defendants' position: a testifying defendant is required to answer questions as to his state of mind.***

Further, many of the areas utilizing circumstantial evidence apply an objective standard in determining whether the requisite state of mind has been proven. This standard —which looks to what a reasonable person's state of mind would be—is more susceptible to circumstantial proof than a standard which requires a finding of the subjective state of mind of the particular party. For example, a more direct evidentiary connection can be made between proof of the facts known to a reporter and the conclusion that a reasonable person given those facts would have entertained serious doubt as to the truth of materials published than between proof of such facts and the conclusion that this particular reporter did entertain serious doubts as to the truth of the published materials.

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* Not only do media defendants testify in defamation cases but they also frequently volunteer testimony specifically regarding their state of mind when it appears advantageous to do so (*see* cases cited at pp. 29-30 of plaintiff's brief).

** It has long been recognized that defendants who take the stand in criminal cases may testify directly as to their state of mind, regardless of whether there is circumstantial evidence on that issue. *Crawford* v. *United States*, 212 U.S. 183, 202, 205 (1909); *Krogmann* v. *United States*, 225 F.2d 220, 229 (6th Cir. 1955). Similarly, upon cross-examination, a defendant would be compelled to answer questions on his state of mind.

*** In addition, in a criminal case, the adverse party seeking to prove the state of mind is the Government which has available in its efforts to obtain evidence on that issue the investigatory resources of the Federal Bureau of Investigation and other governmental agencies as well as the subpoena power of the grand jury.



The cases cited by defendants (Def. Br. p. 65n.) are not apposite to the issues in this case.* In *United States* v. *Fleming*, 479 F.2d 56, 57 (10th Cir. 1973), the evidence in a mail obstruction case included a pre-trial statement given by defendant as to his state of mind concerning any dereliction of duties and his trial testimony as to his intentions in throwing away certain circulars. *United States* v. *Curtis*, 537 F.2d 1091, 1097 (10th Cir. 1976), *cert. denied*, 429 U.S. 962 (1977), involved violations of the Mail Fraud Statute where intent may be inferred from what the defendant should have known. *See United States* v. *Mandel*, 415 F. Supp. 997, 1007 (D.Md. 1976). *In re Equity Funding Corporation of America Securities Litigation*, [1976-77 Transfer Binder] CCH Fed. Sec. L.Rep. ¶95,714 at 90,474 (C.D. Cal. 1976), did not conclude that because state of mind may be based on "inference drawn from the evidence" it was not necessary or important to inquire as to the state of mind of defendant Peat, Marwick, Mitchell & Co. Indeed, one of the items of evidence specifically described by the Court was a memorandum prepared by a Peat, Marwick employee describing the conclusion of one of the firm's partners regarding the type of treatment the accounting firm had received from an Equity Funding corporation. In *Rolf* v. *Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978), the Court stated that knowing or intentional misconduct could be established by proof of conduct which represents "an extreme departure from the standards of

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* More to the point on the issue of proof of state of mind is this Court's consideration in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) of the difficulty in plaintiff's establishing motive and intent where the proof of such matters is largely in the hands of the alleged wrongdoers. *Id.* at 473. On the issue of the purpose of the conspiracy alleged in *Poller*, this Court referred to the deposition testimony of CBS Vice President Salant as to his opinion of what would happen if CBS or NBC abandoned a UHF station. *Id.* at 472.

ordinary care"—a standard which defendants herein would obviously contend was inadequate to establish their state of mind.

Similarly, it seems unlikely that defendants are arguing for the application of the *Weitzman* v. *Stein*, 436 F.Supp. 895, 903 (S.D.N.Y. 1977) approach that the failure to disclose a transaction "is itself highly persuasive evidence of the existence of defendants' deliberate intent . . . .". In that event, the failure to include in the broadcast any reference to the Donovan statements, Franklin's second filmed interview, the statements of many soldiers regarding Herbert's concern for the treatment of the Vietnamese, and the balance due on the hotel bill (Pl. Br. pp. 9-17) may well be treated as "highly persuasive" evidence of defendants' intent to present on the program a picture of Herbert contrary to that known to defendants from their investigation. In fact, defendants have attacked such a view as an unsupported novel theory of "libel by omission" (Def Br. pp. 9-10 footnote *). While defendants' position is wrong,* it reflects their fundamental approach to preclude both direct proof of a reporter's state of mind and possible circumstantial evidence of that state of mind.**

While ignoring the impact of the editorial judgment privilege on the *Sullivan* plaintiff's ability to establish ac-

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* *See e.g.: Goldwater* v. *Ginzburg*, 414 F.2d 324, 329 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Varnish* v. *Best Medium Publishing Co., Inc.*, 405 F.2d 608, 611 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969).

** The privilege created by the Court of Appeals may well have removed the entire area of editorial process from judicial inquiry. Not only questions posed directly to defendants, but all forms of possible evidence (whether testimonial or documentary) covering the entire period from the gathering of the raw data to the broadcast of the finished product may now have become immune from the defamed plaintiff's efforts to gather and present clear and convincing proof of actual malice. (*See* Pl. Br. pp. 33-35)



tual malice, the defendants' brief totally exaggerates the, at best, speculative claim that discovery bearing upon a reporter's views of the truth or falsity of specific matters related to the materials ultimately published threatens the robust debate contemplated by the First Amendment. In *Zurcher* v. *The Stanford Daily, supra*, this Court was faced with the contention that a search of the offices of a third-party newspaper under a search warrant would seriously threaten the ability of the press to gather, analyze and disseminate news because (1) there will be physical disruption, (2) confidential sources will dry up, (3) reporters will be deterred from recording and preserving their recollections for future use, (4) "internal editorial deliberations" will be disclosed and (5) self-censorship will result in order to conceal the press' possession of information. 56 L.Ed. 2d at 540. Mr. Justice White, for the majority, rejected the press' predictions of dire consequences and found:

> . . . Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.
>
> There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The

> warrant issued in this case authorized nothing of this sort. Nor are we convinced, anymore than we were in Branzburg v. Hayes, 408 US 665, 33 L Ed 2d 626, 92 S Ct. 2646 (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.
>
> (56 L.Ed. 2d at 541-542)

The *Zurcher* analysis demonstrates the fundamental error reflected in the conclusion of the Court of Appeals that the disputed discovery sought in this defamation case would have an incremental chilling effect of constitutional dimension. The absence of any such effect in this case is even more obvious than in *Zurcher:* (1) the discovery order of the District Court was issued after notice to defendants that such discovery was being sought, (2) defendants had an opportunity to and did, in fact, extensively argue to the District Court that the discovery should not be ordered, (3) the discovery sought, involving answers to particular questions, could not have been more specific,* (4) the disputed questions were directly related to and arose from specific activities of defendants conducted in

* The significance of this type of specificity was noted in Mr. Justice Stewart's dissent:

> A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant, while a subpoena would permit the newspaper itself to produce only the specific documents requested.
>
> (56 L.Ed. 2d at 546)



connection wtih the preparation and presentation of a particular program.* The Court of Appeals finding of an unconstitutional chill rests upon abstractions in conflict with the decisions of this Court.

## CONCLUSION

For all of the reasons set forth here and in plaintiff's original brief, it is respectfully urged that the judgment of the Court of Appeals for the Second Circuit be reversed and the Order entered by the District Court be reinstated in its entirety.

Respectfully submitted,

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* The answers sought by the disputed questions are clearly sufficiently relevant to the issue of actual malice to satisfy a probable cause requirement under a search warrant. *Cf. Zurcher,* 56 L.Ed. at 542. More important, defendants had a full opportunity to convince the District Court before discovery was ordered that the questions were not relevant. In fact, defendants did make that contention and Judge Haight correctly rejected it. *See* pp. 64a, 65a.